No. 12,569

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED HEADY and ESTHER HEADY, dba Heady Hotel,

Appellants,

vs.

LAWRENCE E. SLAVIN,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The plaintiff, Lawrence E. Slavin, through his attorney, Robert J. McNealy, of Seldovia, Alaska, filed his complaint on September 7th, 1949 (Tr. p. 4), demanding judgment against defendants in the sum of One Thousand Two Hundred Eighty Dollars ($1,280.00), for work performed as a carpenter for defendants over a period of sixteen weeks, between October 2nd, 1947, and January 23rd, 1948. Plaintiff further alleged in his complaint that a stipulated wage of $2.00 per hour, plus board and room, was to be his compensation, and in the prayer of the complaint, asked for interest on the sum of One Thousand Two Hundred Eighty Dollars ($1,280.00) from the

23rd day of January, 1948, and the sum of Five Hundred Dollars ($500.00) as attorney's fees. Defendants filed their answer on October 4, 1949, admitting that the plaintiff did work for the defendants but denying the amount of work performed by plaintiff and in the nature of an affirmative defense, in Paragraph II of the answer (Tr. p. 5), defendants alleged that the plaintiff offered to work for his board and room only, that plaintiff insisted upon working even after he was told that defendants could not pay him for his labor. On October 19th, 1949, plaintiff filed a reply, denying each and every statement contained in defendants' answer not in full accord and agreement with plaintiff's complaint except defendants' statement that no price for work was agreed upon and alleging that plaintiff understood that he was to receive going carpenter's wages. (Tr. p. 7.) Defendants made no objection to the reply at the commencement of the trial. The trial of the case commenced on February 8th, 1950, and was submitted to the jury on February 9th, 1950. The jury returned a verdict in favor of the plaintiff for the sum of One Thousand Two Hundred Eighty Dollars ($1,280.00), plus interest at the rate of six per cent (6%) per annum from January 23rd, 1948. (Tr. p. 8.) A motion for a new trial was filed on February 17th, 1950, and denied. Thereafter judgment issued and defendants appealed.

ARGUMENT.

Appellee will follow the order of argument chosen by appellants, and first direct argument to Points 8, 9 and 10, relied upon by appellants for reversal.

No. 8. The Court erred in not sustaining defendants' motion to dismiss the case at the close of the plaintiff's evidence. (Tr. p. 30.)

At the close of plaintiff's case the following proceedings took place (Tr. p. 86):

> "Mr. McNealy. We have no more witnesses, Your Honor.
>
> Mr. Bell. Just for the record, Your Honor, we move to dismiss and to instruct the jury to return a verdict for the defendants.
>
> The Court. Motion is denied.
>
> Mr. Bell. Exception.
>
> The Court. And the exception is noted.
>
> The Court. Witness may be called on behalf of defendants."

An application to the Court for an order shall be by motion which shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Federal Rules of Civil Procedure, Rule 7 (b) (1).

The motion made by appellants failed to state any grounds whatsoever in support of a motion to dismiss or for a directed verdict, and was properly denied by the Court.

No. 9. The Court erred in overruling the defendants' motion to dismiss at the close of all of the evidence. (Tr. p. 31.)

Appellee has searched the record diligently and can find no record that such a motion was ever made. (Tr. p. 125 through 129.)

No. 10. The Court erred in submitting on a *quantum meruit* instruction when the action was based upon an exact, explicit contract which was not proven.

Appellants' position is that under Rule 7 (a), Federal Rules of Civil Procedure, appellee's reply should be disregarded as it was not ordered by the Court.

An analysis of Rule 7 (a) indicates that the Court can require a reply to an answer and indicates by inference that the Court can permit a reply when voluntarily filed, as was the fact in this case.

The reply was voluntarily filed by plaintiff on October 19th, 1949. Defendants made no motion to strike the reply at the time it was filed nor at the commencement of the trial, three and one-half months after the reply was filed. (Tr. p. 36.)

At the commencement and throughout the trial, the Court considered the reply a part of the pleadings. (Tr. p. 39.) At page 11, Tr., in Paragraph 3 of Instruction No. 1 to the jury, the Court said:

> "In his Reply to the defendants' Answer, the plaintiff denies each and every allegation made by the defendants in their Answer which is not in full accord and agreement with the plaintiff's Complaint, except only defendants' statement that, 'No price for work was agreed upon.' and that plaintiff understood he was 'to have going carpenter's wages'."

which fully indicates the Court considered the reply a part of the pleadings.

Again in Instruction No. 3 (Tr. p. 13), the Court said:

> "If you find that the agreement was entered into as claimed by the plaintiff in his Complaint, as modified by his Reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered."

And again at Tr., page 134:

> "If you find that the agreement was entered into as claimed by the plaintiff in his Complaint, as modified by his Reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered."

All of which proceedings clearly prove that the Court considered the reply as modifying the complaint to the extent that, as to compensation for his services, he was to receive going carpenter's wages. There was undisputed testimony that going carpenter's wages were $2.00 per hour, plus board and room. (Tr. pp. 39 and 40.)

At page 62, Tr., the following proceedings are reported:

> "Q. (Mr. Bell). There wasn't any agreement for $2.00 an hour?
>
> A. I understood that if he was going to pay me wages that it would be at the going wage scale.
>
> Q. You didn't have an agreement with Al as to $2.00 per hour and there wasn't any statement about $2.00 per hour?
>
> A. I believe something came up because he asked me what I was getting from Squeaky in Seldovia."

The Federal Rules of Civil Procedure became effective in Alaska on July 18, 1949. (Public Law 175 Eighty-first Congress, Chapter 343, First Session.)

Prior to that time, pleadings were covered by Section 55-5-61, Alaska Compiled Laws Annotated, 1949, which reads as follows:

> "Reply: When permitted. When the Answer contains new matter, constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the Complaint, constituting a defense to such new matter in the Answer. New matter constituting a 'defense' as used herein, shall be deemed to include what at common law were known as matters in abatement."

New matter in defendants' answer consisted of allegations that plaintiff offered to work for board and room; that plaintiff insisted on working even after being informed that defendants had no money to pay him for same; that he worked only as he saw fit, never a full day, never a full week (Tr. p. 5); all in the nature of affirmative or new matter to which a reply would not have been improper, prior to adoption of the Federal Rules of Civil Procedure. In his reply, plaintiff denied all of such new matter "except only defendants' statement that no price for work was agreed upon in that plaintiff understood that he was to have going carpenter's wages". (Tr. p. 7.)

While the above quoted portion of the reply might appear to be inconsistent with the complaint, upon analysis it is not, as it merely states in effect that even though no definite amount was agreed upon, plaintiff was to have the going wage, which is identical with the amount mentioned in the complaint, to-wit, $2.00 per hour.

The case of *Zydney v. New York Creditmen's Association,* CCA 2nd, 113 Fed. (2d) 986, cited by appellants on page 18 of their brief, involved a situation where a complete departure from the rules of pleading had occurred.

Instead of filing a proper answer, the Trustee in Bankruptcy filed an "Answering Affidavit", to which a "Reply Affidavit" was filed, which was argumentative and contained much new matter. The case was not decided on the point of pleading raised, but on

the fact that pledgee had failed to retain dominion over the pledged property.

In *Carpenter v. Rohm and Hass Co., Inc.* (Civ 976), 75 Fed. Sup. 732, cited by appellants on page 18 of their brief, would not be applicable in the case at bar. There the district judge himself refused to consider the reply and supplementary reply because irrelevant and objectionable and had not been ordered by the Court. In this case, the reply was authorized and accepted by the Court and considered in instructions to the jury.

Appellants' contentions that permitting appellee to prove the going carpenter's wage amounted to a variance between pleadings and proof is without sound basis.

On the matter of variance, Section 55-5-71, Alaska Compiled Laws Annotated, 1949, provides:

> "Variance: When material: Proof: Ordering amendment. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended upon such terms as shall be just."

The above quoted section was construed by this Court in *Balabanoff v. Kellogg, et al.,* No. 9419, CCA

9th, 118 Fed. (2d) 597. Rehearing denied January 15th, 1941. In denying a rehearing (page 599), Judge Healy said:

"Appellant has petitioned for rehearing. The chief proposition urged in support of the petition is that the Court lacked power to treat the complaint as amended to conform to the proof. Petitioner says that the governing rule is contained in Section 3456, Compiled Laws of Alaska, 1933 (now ACLA Sec. 55-5-76) and that this statute requires that the amendment be made before submission of the case.

"Rule 15 (b) of the Rules of Civil Procedure, 28 USCA, following Section 723 (c) provides in part: 'When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but the failure so to amend does not affect the result of the trial of these issues.

"Whether the Federal rules are applicable to trials in Alaska, we need not inquire. This particular rule is merely an application of the principle prevailing generally in the States and Territories having systems of code pleading. The Alaska statutes, as found in Chapter 78, Sections 3451, et seq. of the 1933 Code, are in the main identical with those of the code states. Section 3451 provides: 'No variance between the allegation in a pleading and the proof shall be deemed

> material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits * * *'. Section 3452 states: 'When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.' And Section 3461 provides that: 'The Court shall in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.'
>
> "The view here expressed is fully supported by *Black v. Teeter,* 1 Alaska 561, at pages 564, 565. Rehearing denied."

Plaintiff at no time during the trial alleged that he was misled to his prejudice in maintaining his defense upon the merits. If such allegation had been made by the defendants, the Court, under the provisions of the second sentence of Section 55-5-71, ACLA 1949, would have required that defendants prove to the satisfaction of the Court in what respect they had been misled, and if that proof had been satisfactory to the Court, the Court could then have ordered that pleadings be amended upon such terms as might be just.

In this case the defendants were on notice that plaintiff was demanding compensation for work performed on defendants' hotel between October 2nd, 1947, and January 23rd, 1948, at the stipulated rate of $2.00 per hour based on a forty-hour week, as soon

as they were served with the complaint. Plaintiff filed a reply three and one-half months before the trial admitting that there was no agreed rate but alleging that he was to receive going carpenter's wages. No objection to the reply was made at the commencement of the trial. Defendants' defense could not possibly have been prejudiced because the only issues they had to meet under the pleadings were whether plaintiff had actually been employed, whether he had performed the work alleged for a stipulated wage or for the going carpenter's wage.

Appellants have grouped statement of points Nos. 2 and 3 for argument and submitted these points on the law and facts contained in their brief.

No. 2. The verdict as rendered was not supported by sufficient evidence, but was directly contrary to the evidence.

No. 3. The verdict as rendered was against the law.

Appellee will likewise submit argument on these points on the law and facts set forth hereinbefore.

No. 4. The Court erred in allowing incompetent evidence to be introduced on the part of the plaintiff, over the objections of the defendants, as shown by the transcript of the testimony and the Court proceedings.

Appellants' argument that evidence of the going carpenter wage was objectionable by reason of incompetence would hardly seem to apply in view of the undisputed testimony of the plaintiff that he had twenty years' experience as a carpenter (Tr. pp. 39-

40), and had been a member of the union for a number of years. (Tr. p. 54.)

On pages 32 and 33 of their brief, appellants have grouped points Nos. 14, 15 and 16 for argument.

No. 14. The Court erred in adding the words in instruction 3, in the second line, as follows: "or either of them", over the objection of the defendants' counsel, as stated in the record, because there is no evidence of any agreement referred to only in the presence of both of the defendants.

In instruction No. 3 (Tr. p. 12) it is to be noted that the wording is:

> "The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants *or* either of them agreed * * *"

By using the conjunction, the Court properly left to the jury to find whether the plaintiff *or either of the defendants had reached* an employment agreement of any type. (Emphasis supplied.)

At Tr., page 130, the following proceedings are reported:

> "Mr. Nesbett. I want an objection, or rather an exception, to the first paragraph of No. 3, the second line, that it should be 'defendants, or either of them', that particular wording.
>
> The Court. All right, I shall insert that 'defendants, or either of them.'
>
> Mr. Bell. I object to adding that, because there is no evidence of an agreement referred to *only* in the presence of both of them." (Emphasis supplied.)

The objection of counsel for appellants to the added wording was that there was no evidence of an agreement to perform work only in the presence of both defendants, while the obvious intent of the Court was to place fairly before the jury the question of whether the defendants, *or either of them* (emphasis supplied), had made such an agreement with plaintiff; it being obvious that an agreement by Mr. Heady would be binding on Mrs. Heady, or vice versa. As the instruction stood before amendment, the jury might have inferred that any such agreement must have been made by both defendants.

No. 15. The Court erred in adding to instruction 3, after it had finished reading all the instructions to the jury, the words: "going carpenter wages", as shown by the transcript; by giving this added instruction, the Court inferred at least, "going carpenter wages at Anchorage". This was given over counsel for defendants' objection, and at the instance and the request of the attorney for the plaintiff.

Appellee's interpretation of the added wording in the instruction has no basis in the testimony. The only direct evidence of the going carpenter wage in the Homer area in 1947 appears at page 40, Tr., and is to the effect that appellee received $2.00 per hour and board and room at Seldovia, Alaska (near Homer), while doing construction work for a cannery.

No. 16. The Court erred in re-reading a part of the instructions as amended which included the words: "at going carpenter wages" and the Court further erred in adding an oral statement to the jury as fol-

lows: "If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services, and as bearing upon that issue, you may take into consideration all the testimony relating to compensation for similar work under similar conditions, etc.

This amounted to nothing more than a re-reading by the Court of instruction No. 3, as amended (Tr. pp. 12-13 and Tr. pp. 133-134) and was entirely proper.

At page 134, Tr., after re-reading the instruction as amended, the Court said:

> "The Court. Now, these are no more important than the rest of the instructions, and are a part of the instructions. They are entitled to just as much consideration as the other instructions."

No. 5. The Court erred in refusing to strike out certain testimony on a motion of the defendants as shown by the transcript filed herein. (Appellants' Brief, p. 39.)

Testimony which appellants contend should have been stricken commences at page 40, Tr., and concerns going carpenter wages. Appellee will submit this question on the law and facts previously discussed.

In line 6, of the last paragraph on page 40 of appellants' brief, the following wording appears:

> "* * * when it became apparent the witness was testifying about cannery wages, *and not carpenter wages,* * * *" (emphasis supplied).

This amounts to a misstatement of the testimony. (See Tr. p. 39):

"Q. Prior to the time you went to work for the Headys for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter."

EVIDENCE.

Only three witnesses testified at the trial, the plaintiff and the two defendants. The plaintiff testified that he had lived in Homer, Alaska, off and on since 1920, that his occupation was that of carpenter and fisherman; that he had been a carpenter about twenty (20) years; that he began work for the defendants on October 2nd, 1947, and worked for them until January 22nd or 23rd. (Tr. p. 37.) Plaintiff further testified (Tr. p. 41) that the second day he was helping with the carpenter work of the Heady Hotel that the defendant, Alfred Heady, told him that at that time he couldn't see his way clear to pay the plaintiff wages but that he was keeping track of the time and he would pay plaintiff at a later date. On the strength of that, plaintiff sent for his tools at Seldovia, Alaska, and continued to perform skilled carpenter work on the hotel building; that prior to coming to work for the Headys he had been employed by one,

Squeaky Anderson, of the Seldovia Alaska Packers as a carpenter in cannery construction work (Tr. p. 39); that Squeaky Anderson paid him $2.00 an hour and board and room, which was the going carpenter's wage at that time. (Tr. p. 40.) At page 42, Tr., plaintiff testified that he wired to Seldovia to have his tools brought over on the strength of the defendant Alfred Heady's statement that he needed someone, that he couldn't pay the plaintiff then, but he was keeping track of the time and at a later date would reimburse plaintiff, and for that reason alone the plaintiff sent for his tools and paid transportation charges himself. Plaintiff testified that during the course of his employment he installed fifty-four double sash windows and a couple of single sash windows, ten outside doors, made, set the frames for all the chimneys, laid the biggest part of both subfloors and built stairways, finished up living quarters (defendants') in the back end of the hotel and then commenced finishing up rooms upstairs. (Tr. p. 44.) Plaintiff's testimony at page 126, Tr., indicates that on October 25th when it is alleged he was willing to work for board and room only, he had approximately Three Thousand Dollars ($3,000.00) in the bank. The defendant, Alfred Heady, testified that on or about October 2nd, 1947, the plaintiff stated to him that he would like to help out on the building and that he, Alfred Heady, replied that he would like to have the help; that he hadn't any money and didn't need him. (Tr. p. 89.) Alfred Heady's testimony on page 89, Tr., and page 90, Tr., appears contradictory in that he stated to the plaintiff that he would like

his assistance but had no money and didn't need the plaintiff's assistance, plus the fact that materials were hard to get. However, on cross-examination reported at page 105, Tr., and following, Alfred Heady testified that he had windows and doors on hand, most of them, about 2,000′ of celotex, that the dimensions of each floor of the building were 28′ x 80′, that he had enough subflooring on hand at the time the plaintiff arrived to complete the subflooring. The testimony of the defendant, Esther Heady, commencing at page 119, Tr., is generally to the effect that the plaintiff was told that there was no work for him and was not encouraged to stay around the Heady Hotel.

CONCLUSION.

A decision on all of the legal points raised by appellants would seem to depend upon whether or not there was such a variance between plaintiff's pleadings and proof as to prejudice appellants' defense to the action at the trial.

Appellants made no objection to the reply at the time of filing or at the commencement of the trial. The Court clearly authorized the reply and considered it throughout the trial and in its instructions. Appellants knew that the question of going carpenter wages would be an issue three and one-half months before trial. Appellants raised no point on the question of variance in their motion for a new trial. (Tr. p. 19.) In objecting to the introduction of testimony concerning going carpenter wages, appellants did not

state that they were misled to their prejudice in maintaining a defense upon the merits and made no attempt to prove such to the satisfaction of the Court as is required by Section 55-5-71, Alaska Compiled Laws Annotated, 1949.

The action of the trial judge in proceeding with the trial and overruling appellants' objection was in accordance with the discretion given him by Section 55-5-72, ACLA, 1949, which reads as follows:

> "Order when variance immaterial. When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

The action of the trial judge is further supported by Section 55-5-81, ACLA 1949, which reads as follows:

> "Disregard of defects. The Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

The above quoted sections were cited with approval by this Court in *Balabanoff v. Kellogg et al.,* No. 9419, CCA 9th, 118 Fed. (2d) 597 in denying a rehearing on the question of variance, citing *Black v. Teeter,* 1 Alaska 561; and in *James et al. v. Nelson et al.,* No. 8147, CCA 9th, 90 Fed. (2d) 910.

The attention of this Court is also invited to *Wells v. Crawford,* C. of A., Colorado, 127 Pac. 914, which was an action on a written contract where the evidence

showed abandonment of the contract and attempt to collect for the reasonable value of the services. The defendant failed to object on the ground of variance and failed to include variance as a point in a motion for new trial.

In headnote No. 1, the following is reported:

> "The variance between the complaint, alleging an agreed compensation for services and the proof of reasonable value of the services must be disregarded, if defendant was not misled thereby, and substantial justice resulted."

It is submitted that appellants were not misled and actively attempted to meet the issue concerning the going carpenter wage, that the contradictory testimony of plaintiff and defendants on this issue and on the amount of work performed by plaintiff was fairly placed before the jury by the trial judge and the jury's verdict should not be disturbed.

Dated, Anchorage, Alaska,
November 29, 1950.

Respectfully submitted,

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